Supreme Court, U.S.
FILED
APR 6 1992
OFFICE OF THE CLERK

91-1667

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CENTRA, a Delaware corporation, GENERAL HIGHWAY EXPRESS, an Ohio corporation, CENTRAL TRANSPORT, a Michigan corporation, GLS LEASCO, a Michigan corporation, CENTRAL CARTAGE, a Michigan corporation, and MASON AND DIXON TANK LINES, a Tennessee corporation,
Petitioners,

v.

CLIFTON MCDONALD, HERMANN V. MYERS, SR., WILLIAM G. MCINTYRE and DANIEL L. SANDY, in their capacities as trustees of and on behalf of the FREIGHT DRIVERS AND HELPERS LOCAL UNION NO. 557 PENSION FUND,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Patrick A. Moran*
W. Gregory Shanaberger

PATRICK MORAN & ASSOCIATES, P.C.
3000 Town Center, Suite 2700
Southfield, Michigan 48075
Telephone: (313) 353-1360

Of Counsel:
DYKEMA GOSSETT
Craig L. John
Joseph H. Hickey
505 N. Woodward Ave, Suite 3000
Bloomfield Hills, Michigan 48304

BOWNE OF DETROIT
610 W. CONGRESS - DETROIT, MICHIGAN 48226 - (313) 964-1330

QUESTION PRESENTED

Whether the time period under Section 1401 of the Multiemployer Pension Plan Amendments Act ("MPPAA") for demanding arbitration of an asserted withdrawal from participation in a multiemployer pension fund is equitably tolled by the voluntary filing by the Pension Fund of a proof of claim and participation in the Chapter 11 Reorganization proceedings of the employer?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii-iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING CERTIORARI	6

TABLE OF AUTHORITIES

	Page
Banner Industries, Inc. v. Central States, Southeast and Southwest Areas Pension Fund, 875 F.2d 1285 (7th Cir.), *cert. denied*, 493 U.S. 1003 (1989)	8, 9
Banner Industries, Inc. v. Central States, Southeast and Southwest Areas Pension Fund, 657 F. Supp. 875 (N.D. Ill. 1987), *aff'd*, 875 F.2d 1285 (7th Cir.), *cert. denied*, 493 U.S. 1003 (1989)	9
Centennial State Carpenters Pension Trust Fund v. Woodworkers of Denver, Inc., 615 F. Supp. 1063 (D. Colo. 1985)	7
Central States, Southeast and Southwest Areas Pension Fund v. 888 Corp., 813 F.2d 760 (6th Cir. 1987)	6, 7
Central States, Southeast and Southwest Areas Pension Fund v. Slotky, Civil No. 90-3546 (7th Cir. Feb. 24, 1992)	10
Central States, Southeast and Southwest Areas Pension Fund v. T.I.M.E.-DC, Inc., 826 F.2d 320 (5th Cir. 1987)	6
Central Transport, Inc. v. Central States, Southeast and Southwest Areas Pension Fund, 639 F. Supp. 788 (E.D. Tenn. 1986), *aff'd per curiam*, 816 F.2d 678 (6th Cir.), *cert. denied*, 484 U.S. 926 (1987)	15, 16
Central Transport, Inc. v. Central States, Southeast and Southwest Areas Pension Fund, 640 F. Supp. 56 (E.D. Tenn.), *aff'd per curiam*, 816 F.2d 678 (6th Cir.), *cert. denied*, 484 U.S. 926 (1987)	15, 16
Combs v. Adkins & Adkins Coal Co., 597 F. Supp. 122 (D.D.C. 1984)	7
IAM National Pension Fund, Plan A v. Slyman Industries, Inc., 901 F.2d 127 (D.C. Cir. 1990)	7
In re Amalgamated Foods, Inc., 41 B.R. 616 (Bankr. C.D. Cal. 1984)	13

TABLE OF AUTHORITIES — (Continued)

	Page
In re Cott Corp., 26 B.R. 332 (Bankr. D.Conn. 1982) ...	13, 14
In re Graham, 726 F.2d 1268 (8th Cir. 1984)	13
In re Mason & Dixon Lines, Inc., 63 B.R. 176 (Bankr. M.D.N.C.), *appeal dismissed as moot*, 65 B.R. 973 (M.D.N.C. 1986), *aff'd* 841 F.2d 92 (4th Cir. 1988)	3, 5
In re Ottawa Cartage, Inc., 55 B.R. 371 (N.D. Ill. 1985)	13
In re T.D.M.A., 66 B.R. 992 (Bankr. E.D. Pa. 1986)	13
Johnson v. Burnley, 887 F.2d 471 (4th Cir. 1989)	6
Robbins v. Admiral Merchants Motor Freight, Inc., 846 F.2d 1054 (7th Cir. 1988)	6
Trustees of the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Central Transport, Inc., 888 F. Supp 469 (N.D. Ill. 1988)	7, 8, 9, 10, 11
Zipes v. TransWorld Airlines, Inc., 455 U.S. 385 (1982)	6, 7

STATUTES AND REGULATIONS

11 U.S.C. § 362	14
29 U.S.C. § 1301(b)(1)	5
29 U.S.C. § 1399(b)(1)	4
29 U.S.C. § 1401	5
29 U.S.C. § 1401 (a)(1)	8
29 U.S.C. § 1144(d)	13
29 U.S.C. § 1461(a)(1)	11
29 C.F.R. § 2641.2(b)	10

No.

IN THE SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1992

CENTRA, a Delaware corporation, GENERAL HIGHWAY EXPRESS, an Ohio corporation, CENTRAL TRANSPORT, a Michigan corporation, GLS LEASCO, a Michigan corporation, CENTRAL CARTAGE, a Michigan corporation, and MASON AND DIXON TANK LINES, a Tennessee corporation,

Petitioners,

v.

CLIFTON MCDONALD, HERMANN V. MYERS, SR., WILLIAM G. MCINTYRE and DANIEL L. SANDY, in their capacities as trustees of and on behalf of the FREIGHT DRIVERS AND HELPERS LOCAL UNION NO. 557 PENSION FUND,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CenTra, General Highway Express, Central Transport, GLS Leasco, Central Cartage and Mason and Dixon Tank Lines respectfully petition this Court to issue a Writ of Certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit entered on and October 11, 1991, and the denial of Petitioners' Motion for Hearing *en banc* entered on January 8, 1992.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is recorded at 946 F.2d 1059 and is set forth in Appendix A. The Order denying the Motion for Rehearing *en banc* is set forth in Appendix B.

JURISDICTION

The judgment of the Court of Appeals below was entered on October 11, 1991. Rehearing *en banc* was denied on January 8, 1992. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 1144(d), 1401(b)(1), and 1461(a)(1) of the Multiemployer Pension Plan Amendments Act, 29 U.S.C. §§1144(d), 1401(b)(1) and 1461(a)(1) and Section 362 of the Bankruptcy Code, 11 U.S.C. §362.

STATEMENT OF THE CASE

On March 29, 1984, Mason & Dixon sought protection from creditors by filing a Voluntary Petition for Relief (the "Petition") under Chapter 11 of the Bankruptcy Code. The Petition was filed in the Bankruptcy Court of the United States District Court for the Middle District of North Carolina, Greensboro Division (the "Bankruptcy Court"). By Order dated April 13, 1984, the Bankruptcy Court set August 14, 1984 as the bar date by which all claims against Mason & Dixon were required to be filed or be forever barred.

On April 9, 1984, employees of Mason & Dixon represented by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and its affiliated locals (the "Teamsters Union") struck Mason & Dixon, effectively shutting down Mason & Dixon's entire General Commodities Division. *See In re Mason and Dixon Lines, Inc.*, 63 B.R. 176 (Bankr. M.D.N.C.), *appeal dismissed as moot*, 65 B.R. 973 (M.D.N.C. 1986), *aff'd*, 841 F.2d 92 (4th Cir. 1988). Mason & Dixon's General Commodities Division could not regain its customers lost to competing trucking companies during the strike and therefore could not continue in business.

On January 18, 1985, the Freight Drivers and Helpers Local Union No. 557 Pension Fund ("Pension Fund") filed its Proof of Claim in the Mason & Dixon bankruptcy proceedings. The Proof of Claim alleged that Mason & Dixon owed withdrawal liability to the Pension Fund in the amount of $619,101.00. The Proof of Claim sought payment only from Mason & Dixon and no reference was made in the Proof of Claim to the controlled group liability provision of MPPAA upon which the Pension Fund relied in bringing the District Court action below. On or about March 17, 1986, Central Transport, Inc. ("Central Transport") and GLS LeasCo Inc. ("GLS"), two of the Petitioners, filed their Joint Objections to the Pension Fund's Proof of Claim. Mason & Dixon also timely filed Objections to the Proof of Claim. The Pension Fund responded to the Objections on or about July 21, 1986.

The identity of Mason & Dixon's equity security holder and affiliated companies was fully disclosed to the Bankruptcy Court. The Pension Fund consistently exhibited its intent to look solely to the bankruptcy claims process for resolution of its claim and payment of the alleged liability. On August 6, 1986, the Pension Fund issued a Notice and Demand for payment of withdrawal liability allegedly pursuant to 29 U.S.C. § 1399(b)(1). The Notice and Demand was addressed only to Mason & Dixon and claimed that Mason & Dixon permanently ceased all covered operations with respect to the Pension Fund. The Pension Fund acknowledged that Mason & Dixon had filed for protection under the federal bankruptcy laws and indicated its intent to seek payment of the alleged liability through the Bankruptcy Court.

The Proof of Claim was actively litigated by Mason & Dixon and two of the Petitioners. Mason & Dixon, Central Transport and GLS timely filed objections to the Proof of Claim. Further, Central Transport and GLS commenced discovery of the Proof of Claim by serving their Interrogatories, Requests for Production and Requests for Admissions on or about November 26, 1986. The Pension Fund sought two extensions of time within which to respond to the discovery. On February 24, 1987, the Pension Fund served its Answer to the Requests for Admissions and attempted to settle the claim and avoid the necessity of answering the rest of the discovery.

During the settlement conversations with counsel for the Pension Fund, it became clear that the Proof of Claim for a complete withdrawal was erroneous. By letter dated February 16, 1987, counsel for the Pension Fund conceded that at most, a partial withdrawal rather than a complete withdrawal occurred but it was still "unclear what the actual amount of liability will be." (See Exh. G to Brief in Support of Defendants' Motion to Dismiss, Appellate Appendix, pp. 153-54.)

Subsequently, the Pension Fund filed its Motion for Order allowing Unsecured Creditor to Withdraw Contested Proof of Claim. The Bankruptcy Court granted the Pension Fund's Motion on July 19, 1989.

On March 29, 1986, the Bankruptcy Court confirmed the Restated Joint Plan of Reorganization submitted jointly by the Trustee and Central Transport. The Order confirming the Restated Joint Plan of Reorganization is reported at 63 B.R. 176 (Bankr. M.D.N.C. 1986). The Bankruptcy estate has now been closed.

The Pension Fund filed suit in the District Court on or about June 14, 1989, prior to the Bankruptcy Court's Order allowing withdrawal of the Pension Fund's Proof of Claim. The lawsuit was filed not against Mason & Dixon but rather against the Petitioners, who are entities that the Pension Fund alleges are businesses under common control with Mason & Dixon as defined by 29 U.S.C. § 1301(b)(1). The Complaint sought immediate payment from Petitioners of the entire amount of the alleged withdrawal liability. Despite Petitioners having actively contested the alleged liability in the Bankruptcy Court, District Court held that Petitioners had forfeited their right to contest the liability on the merits by reason of the alleged "failure" to invoke the arbitration provision of ERISA. *See* 29 U.S.C. § 1401. The District Court issued its Order Granting Summary Judgment against Petitioners for withdrawal liability. The Court of appeals affirmed that decision.

REASONS FOR GRANTING CERTIORARI

I.

A WRIT SHOULD BE GRANTED BECAUSE THE FOURTH CIRCUIT'S OPINION DIRECTLY CONFLICTS WITH THE OPINION OF THE SEVENTH CIRCUIT ON IDENTICAL FACTS AND IN ERROR REFUSES TO EQUITABLY TOLL THE TIME PERIOD IN WHICH AN EMPLOYER MUST DEMAND ARBITRATION OF WITHDRAWAL LIABILITY UNDER THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT.

A. The Arbitration Provisions of MPPAA Are Non-Jurisdictional and, Therefore, Subject to Equitable Tolling.

The Fourth Circuit's ruling on equitable tolling was absolute — equitable tolling is inapplicable in the MPPAA context. However, under settled legal principles, a limitations period is always subject to equitable tolling unless the limitations requirement is jurisdictional. *Zipes v. TransWorld Airlines, Inc.*, 455 U.S. 385, 393 (1982); *Johnson v. Burnley*, 887 F.2d 471 (4th Cir. 1989). At issue in *Johnson* was whether the thirty (30) day limitations period for seeking review of a decision of the Merit Systems Protection Board was jurisdictional. After ruling that the limitations period was *not* jurisdictional, the court acknowledged that equitable tolling, estoppel and waiver were applicable as justice dictated. *Id.* at 478.

The Fourth Circuit's decision is inconsistent with *Zipes* and *Johnson*. In Section D of its opinion, the Fourth Circuit correctly reversed the district court's holding that MPPAA's arbitration requirement was a jurisdictional bar. The Fourth Circuit's conclusion that MPPAA's arbitration requirement is a prudential bar rather than a jurisdictional prerequisite is supported by every other circuit court which has addressed this issue. *See, e.g., Robbins v. Admiral Merchants Motor Freight, Inc.*, 846 F.2d 1054, 1056 (7th Cir. 1988); *Central States, Southeast and Southwest Areas Pension Fund v. T.I.M.E.-DC, Inc.*, 826 F.2d 320, 325-28 (5th Cir. 1987); *Central States, Southeast and Southwest*

Areas Pension Fund v. 888 Corp., 813 F.2d 760, 764 (6th Cir. 1987).

Having determined that the arbitration requirement was not jurisdictional, the Fourth Circuit was bound to follow *Zipes* and apply the doctrine of equitable tolling. However, without any citation to *Zipes* (or any explanation as to its inapplicability), the Fourth Circuit erroneously concluded that equitable tolling cannot be applied, as a matter of law, to the non-jurisdictional arbitration requirements of MPPAA.

Indeed, the Fourth Circuit's ruling that equitable tolling is "inapplicable in the MPPAA context," (i) conflicts with the Seventh Circuit's opinion in *Trustees of the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Central Transport, Inc.*, 888 F.2d 1161 (7th Cir. 1989) which was decided on identical facts and involved the same employer group as this Petition; (ii) is not supported by *any other circuit court*[1]; and is (iii) contrary to regulations promulgated by the Pension Benefit Guaranty Corporation ("PBGC").

The Fourth Circuit's decision is in conflict with the Seventh Circuit's decision in *Trustees of the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Central Transport, Inc.*, 888 F.2d 1161 (7th Cir. 1989). In *Central Transport*, the Seventh Circuit held that the time for initiating arbitration had been equitably tolled while a withdrawal liability assessment was being contested through the bankruptcy claims process. The withdrawal liability assessment at issue in

---

[1]Even the courts which have refused to toll the time for initiating arbitration have done so on the specific factual context and not on the grounds that equitable tolling is inapplicable to MPPAA as a matter of law. *See IAM National Pension Fund, Plan A v. Slyman Industries, Inc.*, 901 F.2d 127, 129 (D.C. Cir. 1990) (tolling argument was waived when not presented to the bankruptcy court); *Centennial State Carpenters Pension Trust Fund v. Woodworkers of Denver, Inc.*, 615 F.Supp. 1063, 1068 (D. Colo. 1985) (defendant failed to timely file a district court action prior to expiration of the arbitration limitation period); *Combs v. Adkins & Adkins Coal Co.*, 597 F.Supp. 122, 127 (D.D.C. 1984) (defendants took no action which would toll the statutory time frames).

Central Transport, like the case at bar, arose out of the Mason & Dixon bankruptcy proceedings. The Chicago Truck Drivers Fund filed a proof of claim with the bankruptcy court on or about January 10, 1985 and made no attempt to assert the liability outside the bankruptcy proceedings. Central Transport, Inc. ("Central Transport, and GLS LeasCo, Inc., two of the Petitioners herein) timely filed objections to the proof of claim and initiated discovery. Prior to the bankruptcy court's disposition of the proof of claim, the Chicago Truck Drivers Fund filed suit against some of the employers, arguing that their failure to initiate arbitration fixed their liability for Mason & Dixon's withdrawal. The district court agreed and entered summary judgment in favor of the Chicago Truck Drivers Fund.

The Seventh Circuit reversed holding that the employer had a reasonable belief that the issue of withdrawal liability could be addressed by a bankruptcy court if one of the parties was a debtor in bankruptcy. As a consequence, the Seventh Circuit Court opined:

> . . . consistent with our equitable tolling decision in *Banner*, the filing in the bankruptcy court by the Fund, accompanied by a timely response by the defendants, tolled the time period for seeking arbitration under section 1401(a)(1). Moreover, the equitable tolling rationale continues to apply in this case because the Fund filed this lawsuit in district court against the defendants prior to the dismissal of its claim in the bankruptcy court. The tolling of the time period under section 1401(a)(1) for seeking arbitration is extended until the final disposition of this case.

888 F.2d at 1165.

The Seventh Circuit's decision in *Central Transport* was a logical extension of its decision in *Banner Industries, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 875 F.2d 1285 (7th Cir.), *cert. denied*, 493 U.S. 1003 (1989). In *Banner Industries*, the employer brought an action for declaratory relief against the Central States Pension Fund, arguing that it was

not an "employer" under ERISA and, therefore, not liable to the fund for withdrawal liability. At issue was whether the dispute concerning Banner's "employer" status was subject to arbitration. *Banner Industries*, 875 F.2d at 1286.

After Banner filed its Complaint, but prior to a decision by the district court, the statutory period for initiating arbitration expired. Since Banner did not initiate arbitration within the prescribed period, Central States Pension Fund sought summary judgment on the withdrawal claim. The district court rejected this argument and held that Banner's suit for declaratory relief tolled the statutory time frame for arbitration. The district court observed:

> if the issue is whether or not one of the parties falls within the arbitrator's jurisdiction, as in this case, the same considerations of fairness dictate that the time for pursuing arbitration be tolled until a determination is made that the party is subject to the mandatory arbitration provisions.

Banner Industries, Inc. v. Central States, Southeast and Southwest Areas Pension Fund, 657 F. Supp. 875, 885 (N.D. Ill. 1987), *aff'd*, 875 F.2d 1285 (7th Cir., *cert. denied*, 493 U.S. 1003 (1989). The Seventh Circuit affirmed and held that the district court did not abuse its discretion by tolling the time within which arbitration could be invoked. 875 F.2d at 1285.

The facts before the Seventh Circuit in *Central Transport* and this Court are identical. In this case, the Pension Fund voluntarily filed a Proof of Claim in the Mason & Dixon bankruptcy proceedings. In addition, the Pension Fund *never* (until the filing of this case) exhibited an intent to litigate its withdrawal liability assessment outside the bankruptcy claims process. The employers and Mason & Dixon filed timely objections to the proof of claim in the forum chosen by the Pension Fund. However, before the bankruptcy court adjudicated the claim, the Pension Fund filed suit and sought to withdraw its claim. Accordingly, under the *Central Transport* rationale, the time for initiating

arbitration in *this* case must be equitably tolled until final disposition of this case.

The Seventh Circuit was asked by the PBGC to reexamine its decision in *Central Transport* in the context of its decision in *Central States, Southeast and Southwest Areas Pension Fund v. Slotky*, Civil No. 90-3546 (7th Cir. Feb. 24, 1992). The court declined to reverse *Central Transport*, finding that "the other members of the controlled group had reasonably believed that they could obtain an authoritative determination of their liability in the bankruptcy proceeding." The court noted that the decision "can be questioned" due to MPPAA's "evident desire that challenges to withdrawal liability be resolved quickly", that an employer might simultaneously proceed with both arbitration and litigation, and that an employer could, if it chose, have initiated arbitration. The court postulated that the decision is justifiable as a decision while the MPPAA statute was being developed in litigation where "uncertainties about the law made judges hesitate to penalize litigants for having made questionable procedural choices." Those are the very equitable considerations that the Fourth Circuit had before it when it completely disregarded the Seventh Circuit's decision in *Central Transport* and the decisions of other circuits in analogous cases. The Fourth Circuit's decision created conflicts among the circuits concerning the availability of equitable relief under MPPAA.

The Fourth Circuit's opinion below did not address the conflict between its decision and that of the Seventh Circuit, nor did the opinion consider or cite to the myriad of decisions adopting equitable tolling. Certiorari should be granted to resolve these issues and reconsider the Court of Appeals' rejection of equitable tolling as applied to the non-jurisdictional arbitration requirement under MPPAA.

Finally, contrary to the position taken by the PBGC in the courts below, long standing PBGC regulations confirm that equitable tolling is available under MPPAA. PBGC regulations provide that "parties may . . . by mutual agreement at any time, waive or extend time limits specified." 29 C.F.R. § 2641.2(b). If

private parties may simply agree to extend MPPAA's time limitations notwithstanding the important congressional policies behind MPPAA, then surely federal courts have that same power. In fact, Congress specifically codified the federal court's equitable jurisdiction in the civil action provision of MPPAA. *See* 29 U.S.C. § 1461(a)(1).

B. The Time Within Which Petitioners Can Initiate Arbitration Should Have Been Tolled As A Factual Matter.

Neither the Fourth Circuit nor the district court considered whether the facts of this case warrant application of equitable tolling. In light of the undisputed facts and the Seventh Circuit's consideration of these facts in *Central Transport*, this Court should rule on rehearing that the time to initiate arbitration has been tolled.

The Fourth Circuit cogently presented the essential facts. On January 11, 1985, while Mason & Dixon was in bankruptcy, the Pension Fund issued its notice and demand for payment of withdrawal liability. On or about January 18, 1985 the Pension Fund voluntarily filed its proof of claim in the Mason & Dixon bankruptcy proceedings. Timely objections to the Pension Fund's claim were filed by Central Transport and GLS LeasCo, Inc. The parties actively contested the claim until July 19, 1989 (over a month *after* this collection suit was filed) at which time the Bankruptcy Court allowed the Pension Fund to withdraw its claim over the objections of Petitioners. At no time prior to the filing of its complaint in the district court did the Pension Fund notify Petitioners that collection of Mason & Dixon's withdrawal liability would be attempted outside of the bankruptcy claims process.

Section C of the fourth Circuit's opinion supports Petitioner's analysis. As a prologue to the discussion of Petitioner's arguments, the Fourth Circuit held that notice to one member of a controlled group of corporations constitutes notice to all mem-

bers of the group. The theory behind the "notice to one is notice to all" analysis emanates from MPPAA itself:

> all employees of trades in business (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer.

29 U.S.C. § 1401(b)(1). The corollary to this theory is also self evident: If notice to one binds the group, a valid defense by one member of the group must similarly preserve the rights of all members of the controlled group.

Assuming, *arguendo*, that Mason & Dixon and Petitioners are business under common control, the only issue is whether *Mason & Dixon* could legitimately contest its liability to the Pension Fund in the bankruptcy claims process. The bankruptcy courts have addressed this precise issue and *unanimously* concluded that the Bankruptcy Code supplants ERISA (and, therefore, MPPAA) with respect to the arbitration of withdrawal liability claims against debtors in bankruptcy.[2] *See In re T.D.M.A.*, 66 B.R. 992 (Bankr. E.D. Pa. 1986); *In re Amalgamated Foods, Inc.* 41 B.R. 616 (Bankr. C.D. Cal. 1984); *In re Cott Corp.*, 26 B.R. 332 (Bankr. D.Conn. 1982).

In *In re Amalgamated Foods*, the Western Conference of Teamsters Pension Fund, like the Pension Fund in the instant case, filed a proof of claim for withdrawal liability and moved for summary judgment, claiming that the debtor's failure to initiate ERISA arbitration precluded any defense to the claim. The debtor had, however, filed a timely objection to the claim. The court utilized settled principles of statutory construction and concluded that arbitration was not required. The court held:

---

[2] The Pension Fund's Proof of Claim *alone* establishes the primacy of the bankruptcy claims process over ERISA arbitration. "The result of the filing of a Proof Of Claim is to submit to a determination by the bankruptcy judge the merits of the claim." *In re Penn Hook Coal Co.*, 68 B.R. 804, 808 (Bankr. W.D. Va.), *mod. sub nom. Credit Alliance Corp. v. Penn Hook Coal.*, 77 B.R. 57 (W.D. Va. 1987).

> . . . by dispensing with the arbitration process, I think I can serve the purposes of both statutes together.
>
> The issue seems to me purely one of statutory interpretation. On the face of things, it seems clear that Congress intended to send the matter to arbitration. It seems equally clear that Congress intended bankruptcy claims to be resolved in the bankruptcy forum. Similarly, it seems clear that Congress could, if it wished, have declared that the arbitration procedure prevails over the claims process. In a matter of this sort, the choice of Congress must be respected.

In re Amalgamated Foods, 41 B.R. at 617-18 (citation omitted). The court specifically concluded that a debtor is under no obligation at *any time* to initiate arbitration. *Id.* at 620. In fact, the court observed that a debtor can even *ignore* a notice and demand for withdrawal liability with impunity. *Id.* Thus, the debtor was allowed to continue its defense of the withdrawal liability claim in the claims resolution process established by the Bankruptcy Code. *Accord T.D.M.A.*, 66 B.R. at 996 (nothing in ERISA or MPPAA denied to the bankruptcy court its fundamental function of determining the validity of MPPAA claims against the estate); *Cott Corp.*, 26 B.R. at 335 (bankruptcy claims process took priority over ERISA).

The holdings of *Amalgamated Foods*, *T.D.M.A.* and *Cott Corp.* are supported by the ERISA statutory scheme. Section 1144(d) provides.:

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supersede *any law of the United States* (except as provided in Sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

29 U.S.C. § 1144(d) (emphasis added). The effect of this provision is to affirm the primacy of the Bankruptcy Code over ERISA. *In re Graham*, 726 F.2d 1268, 1273 (8th Cir. 1984); *In re Ottawa Cartage, Inc.*, 55 B.R. 371-78 (N.D. Ill. 1985).

The foregoing case law demonstrates that when a claim for withdrawal liability has been asserted against a bankrupt entity, the bankruptcy claims process is an acceptable, even preferable, forum within which to contest the liability. A debtor in bankruptcy does not have to accept or initiate ERISA arbitration. In fact, the initiation of the ERISA collection procedures by a pension fund has been found to violate the automatic stay imposed by 11 U.S.C. § 362. *In re Cott Corp.*, 26 B.R. at 336.

The Fourth Circuit erred by refusing to hold that the timely objections filed to the Pension Fund's claim in the Mason & Dixon bankruptcy proceeding tolled the time for initiating arbitration. If Mason & Dixon could preserve its rights in the bankruptcy claims process, then the rights of the single employer were similarly preserved. The Seventh Circuit reached this conclusion after exhaustively analyzing Petitioner's actions with respect to the claim filed by the Chicago Truck Drivers Fund in the Mason & Dixon bankruptcy proceedings. It would be grossly unfair that Petitioner's ability to arbitrate the vicarious imposition of Mason & Dixon's withdrawal liability would depend solely upon the geographical location of the pension fund.

II.

A WRIT SHOULD BE GRANTED BECAUSE THE FOURTH CIRCUIT'S OPINION DIRECTLY CONFLICTS WITH THE FINDING OF THE SIXTH CIRCUIT THAT THE PETITIONERS WERE NOT PART OF A CONTROLLED GROUP WITH MASON & DIXON ON THE DATE OF WITHDRAWAL.

Central States Pension Fund argued to this Court that the January 11, 1985 Notice and Demand of Withdrawal Liability (the "Notice and Demand") set forth the relevant date for determining controlled group membership. The Notice and Demand asserted that the date of withdrawal was March, 1984.

Appellate Record 48-50. At Page 17 of its Appellees' Brief in the Court of Appeals, the Fund argued:

> . . . neither March 30, 1986 nor any date thereafter is the relevant date for determining control group membership, as the notice [of withdrawal] was given in January, 1985. Appellate Record 48-50.

Accepting this date as true, the Fourth circuit overlooked the undisputed, material fact that Petitioners were not in a controlled group with Mason & Dixon at any time relevant to establishing Petitioner's withdrawal liability.

The factual question of when Petitioners (through Central Transport) purchased Mason & Dixon for purposes of assessing withdrawal liability was previously litigated in the United States District Court for the Eastern District of Tennessee. *Central Transport, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 640 F. Supp. 56 (E.D. Tenn. 1986), *aff'd per curiam*, 816 F.2d 678 (6th Cir.), *cert. denied*, 484 U.S. 926 (1987); and *Central Transport, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 639 F. Supp. 788 (E.D. Tenn. 1986), *aff'd per curiam*, 816 F.2d 678 (6th Cir.), *cert. denied*, 484 U.S. 926 (1987) (hereinafter the "Tennessee Litigation"). At issue in the Tennessee Litigation was whether Mason & Dixon and Central Transport were in a controlled group on December 31, 1983, the date Central States Pension Fund asserted was the date of withdrawal. After reviewing the Mason & Dixon stock purchase agreement (the "Stock Purchase Agreement") and all other relevant evidence, the district court concluded:

> Central Transport did not become the actual owner of Mason Dixon's stock until February, 1985.

Central Transport, 639 F. Supp. at 791.

The facts of this case *have not and cannot* change from the facts underlying the basis of the Tennessee Litigation. The Stock Purchase Agreement contained several conditions precedent. Central Transport was legally and contractually prohibited from

purchasing Mason & Dixon until it received approval from the Interstate Commerce Commission ("ICC") *and* the regulatory agencies of each state in which Mason & Dixon operated in *intra*state commerce. The ICC and state authorities were collectively referred to in the Stock Purchase Agreement as the "Regulatory Authorities." Central Transport did not receive approval of *all* Regulatory Authorities until at least November 1984, well after the alleged withdrawal date of March 1984 asserted by Central States Pension Fund in its Notice and Demand.

In the Tennessee Litigation, the District Court commented on the failure to receive ICC approval:

> ICC approval was a specific contingency in regard to the purchase of Mason and Dixon Lines, Inc., and [Central Transport, *et al.*] had no control over this contingency.

Central Transport, 640 F. Supp. at 56. Importantly, the Stock Purchase Agreement refers not only to ICC approval but to approval of the "Regulatory Authorities." Accordingly, Central Transport could not become the owner of Mason & Dixon in March, 1984 because, as the undisputed facts evidence, several state Regulatory Authority approvals had not yet been granted. Thus, the district court in the Tennessee Litigation properly concluded and the Sixth Circuit affirmed that Central Transport did not own Mason & Dixon until February 2, 1985.[3] To the

---

[3]The Pension Fund is similarly foreclosed from arguing that Central Transport constructively owned Mason & Dixon (by way of an option) after execution of the Stock Purchase Agreement. The Stock Purchase Agreement did not constitute an option to purchase Mason & Dixon because Central Transport could not cause the Regulatory Authorities to approve the purchase of Mason & Dixon. Approvals were controlled entirely by the various governmental bodies of the United States and the various states and were clearly beyond Central Transport's control. Accordingly, the District Court concluded:

> Therefore, under the facts of this case, the stock purchase agreement was not an option; [Central Transport, *et al.*] had no constructive ownership of Tank Lines [a subsidiary of Mason & Dixon]; and there can be no resulting withdrawal liability on the basis of the [Fund's] theory of constructive ownership.

Central Transport, 640 F. Supp. at 56.

extent that the Court of Appeal's decision necessarily finds that Petitioners owned and were consequently in a "controlled group" in March 1984, the decision is in conflict with the Sixth Circuit's affirmance of the Tennessee Litigation.

CONCLUSION

The opinion of the Court of Appeals, without explanation or comment, conflicts with decisions of the Sixth and Seventh Circuits involving the same employers (petitioners) on the same facts. Thus, to ensure consistency and uniform application of federal law, a writ should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully Submitted,

PATRICK MORAN & ASSOCIATES, P.C.

Patrick A. Moran*
W. Gregory Shanaberger
3000 Town Center, Suite 2700
Southfield, Michigan 48075
Telephone: (313) 353-1360

Of Counsel:

Craig L. John
Joseph H. Hickey
Dykema Gossett
505 N. Woodward Ave., Ste. 3000
Bloomfield Hills, Michigan 48304-7166

APPENDICES

[1059]

The district court in *Dement* declined to enter injunctive relief because the employer, RF & P, had been dismissed and had not been joined as an indispensable party. RF & P is not a party to this action either, yet the district court ordered monthly damages against the union in lieu of an injunction. The *Dement* court could have ordered the UTU to use its best efforts to effect a change in the agreement. An injunction compelling the UTU to seek amendment to the agreement simply does not require the employer's presence in the action. The union could always seek to dissolve the injunction by demonstrating to the court that it had made a reasonable effort to have the agreement amended. Damages in lieu of an injunction, as awarded by the district court below, certainly could have been ordered in *Dement* as well; therefore, they are precluded in this action.

For the forgoing reasons, I would reverse the judgment of the district court.

Clifton McDONALD, Hermann V. Myers, Sr., William G. McIntyre, Daniel L. Sandy, in their capacities as Trustees of and on behalf of Freight Drivers and Helpers Local Union No. 557 Pension Fund, Plaintiffs-Appellees,

v.

CENTRA, INCORPORATED, a Delaware corporation, General Highway Express, an Ohio corporation, Central Transport, Inc., a Michigan corporation, GLS Leasco, Inc., a Michigan corporation, the Mason & Dixon Tank Lines, a Tennessee corporation, Central Cartage Company, a Michigan corporation, Defendants-Appellants. (Two Cases)

Nos. 90-2483, 90-2514.

United States Court of Appeals, Fourth Circuit.

Argued April 11, 1991.

Decided Oct. 11, 1991.

As Amended Nov. 21, 1991.

McDonald v. CENTRA, INC.
Cite as 946 F.2d 1059 (4th Cir. 1991)

Trustees of multiemployer pension plan brought action against solvent members allegedly under control of withdrawing employer to recover withdrawal liability. The United States District Court for the District of Maryland, Frederic Nelson Smalkin, J., 118 B.R. 903, entered judgment for trustees. Solvent members appealed. The Court of Appeals, Ervin, Chief Judge, held that: (1) notice to withdrawing employer was sufficient as to solvent members of corporate group; (2) case did not fall within statutory construction exception to requirement that administrative remedies be exhausted; and (3) bankruptcy of withdrawing employer did not discharge withdrawal liability of solvent members of withdrawing employer.

Affirmed.

1. Pensions 103

Notice of withdrawal liability sent to one member of corporate control group constituted notice to all members with group under Multiemployer Pension Plan Amendments Act; burden of subsequent notification to other control group members was on corporation which received initial notice. Employee Retirement Income Security Act of 1974, § 4219(b)(1), as amended, 29 U.S.C.A. § 1399(b)(1).

2. Labor Relations 434.9

Multiemployer Pension Plan Amendments Act section stating that any dispute between employer and plan sponsor of multiemployer plan regarding withdrawal liability shall be arbitrated does not make arbitration a jurisdictional prerequisite to court action. Employee Retirement Income Security Act of 1974, § 4221(a)(1), as amended, 29 U.S.C.A. § 1401(a)(1).

3. Administrative Law and Procedure 229

Exhaustion doctrine acts as prudential rule that provides courts with method to exercise comity toward administrative agencies and to promote efficient use of judicial resources while protecting rights of parties who have come before court seeking relief.

(1060)

4. Administrative Law and Procedure 229

Exceptions to requirement that parties exhaust administrative remedies before seeking refuge in federal courts include those instances where dispute is a matter of statutory construction; utilization of administrative procedures would cause irreparable injury; and resort to administrative procedures would be futile.

5. Pensions 105

Statutory construction exception to requirement that parties exhaust administrative remedies before seeking refuge in federal court regarding withdrawal liability did not apply to case concerning whether solvent members allegedly under control of bankrupt withdrawing employer were subject to withdrawal liability, although solvent members alleged that consequence of discharge was necessarily an issue of statutory construction; even if interpretation of statutes was required, that alone did not justify bypassing arbitration where postlitigation request for arbitration consumed time of two courts, delayed group's withdrawal contribution to pension fund and could affect stability and security of pension plan.

6. Labor Relations 455

Doctrine of equitable tolling is inapplicable to period for requesting arbitration in Multiemployer Pension Plan Amend-

ments Act cases. Employee Retirement Income Security Act of 1974, § 2 et seq., as amended, 29 U.S.C.A. § 1001 et seq.

7. Bankruptcy 3412

Withdrawing employer's discharge in bankruptcy did not discharge withdrawal liability of solvent corporations allegedly under control of withdrawing employer; were all members of group discharged, withdrawing employer would be allowed to mark its front pockets bankrupt while removing assets to its back pockets. Employee Retirement Income Security Act of 1974, § 4219(b)(1), as amended, 29 U.S.C.A. § 1399(b)(1).

8. Pensions 107

Attorney fees were mandatory, not discretionary, in suit to recover delinquent contributions to multiemployer pension plan. Employee Retirement Income Security Act of 1974, § 502(g), as amended, 29 U.S.C.A. § 1132(g).

Patrick A. Moran, Simpson Moran, Birmingham, MI, argued (Terri L. North, Simpson Moran, Birmingham, MI, Frances Kanterman, Frank, Bernstein, Conaway & Goldman, Baltimore, Md., on brief), for defendants-appellants.

Christine Ann Williams, Abato, Rubenstein, Abato & Smith, P.A., Lutherville, Md., argued, for plaintiffs-appellees.

Jeffrey B. Cohen, Senior Counsel, Pension Ben. Guar. Corp., Washington, D.C., argued (Carol Connor Flowe, Gen. Counsel, Jeanne K. Beck, Deputy Gen. Counsel, Robert S. Marsel, Pension Ben. Guar. Corp., on brief), for amicus curiae.

Before ERVIN, Chief Judge, and PHILLIPS and HAMILTON, Circuit Judges.

OPINION

ERVIN, Chief Judge:

Clifton McDonald, Hermann V. Myers, Sr., William G. McIntyre, and Daniel L. Sandy, the trustees of a qualified multiemployer pension plan, brought this action to collect from the solvent members of a group of corporations allegedly under common control with Mason & Dixon Tank Lines ("Mason & Dixon"), the withdrawing employer. The group of defendant corporations ("the corporate group")[1] appeals the trial court's grant of summary judgment in favor of the pension plan as well as the denial of the group's motion to dismiss. Four issues are presented on appeal. First, whether there is a genuine issue of material fact as to the defendants' membership in a control group. Second, whether the corporate group may defend against (1061) a withdrawal liability suit with defenses they failed to raise during the period of arbitration. Third, whether Mason & Dixon's discharge in bankruptcy operates as a discharge of the liability of the solvent members of the corporate group. Fourth, whether the award of attorney's fees was proper. On each issue we concur with the district court's decision. Accordingly, we affirm.

I.

A.

The trustees on behalf of the Freight Drivers and Helpers Local Union No. 557 Pension Fund ("the Fund") gave notice and demand for payment of the assessed withdrawal liability in January of 1985. In June, 1989 the trustees of the Fund filed suit to collect the withdrawal liability from the members of the corporate group who were solvent. Thereafter, the trustees moved

---

[1] By corporate group, we refer to the defendants. When referring to a set of corporations under common control, we use the term "control group."

for summary judgment. The corporate group moved to dismiss the complaint. Both sides opposed the other's motion. The district court granted the Fund's motion for summary judgment and denied the corporate group's motion to dismiss the complaint. 118 B.R. 903.

The trial court held that arbitration is a jurisdictional prerequisite to the defendant's right to raise defenses to the federal court collection action; thus, the failure of the corporate group to initiate arbitration within the statutory period barred it from contesting the Fund's claim. Alternatively, the district court held that the defendants were a group of commonly controlled corporations on the relevant date; and that Mason & Dixon's discharge in bankruptcy was irrelevant to the liability of the solvent members of the control group. Finally, the trial court held the doctrine of equitable tolling to be unavailable in suits to collect withdrawal liability. The corporate group appealed.

B.

Mason & Dixon filed a petition in bankruptcy seeking relief under Chapter 11 on March 29, 1984. At that time, Mason & Dixon was a signatory to a collective bargaining agreement with the Freight Drivers and Helpers Local Union No. 557. The agreement required Mason & Dixon to make payments to the Fund. The Fund did not, however, receive notice of the filing. The Fund was made aware of the filing nearly six months later, on November 26, 1984. This occurred only in response to an inquiry made by the Fund.

On January 11, 1985 the Fund sent Mason & Dixon a notice and a demand for payment of withdrawal liability in the amount of $619,101. The fund also filed a proof of claim in the bankruptcy proceedings.

On March 14, 1986 defendants Central Transport and GLS Leasco, filed objections to the Fund's proof of claim. On March 29, 1986 Mason & Dixon's plan of reorganization was confirmed in the bankruptcy proceeding.

Subsequently, the Fund reviewed the January, 1985 assessment and found that there was a partial rather than a complete withdrawal. The Fund reduced its assessment and accordingly its claim from $619,101 to $401,960.

In May of 1989, the objections to the Fund's proof of claim were still pending in the Chapter 11 proceedings. On June 6, 1989, the Fund moved for permission to withdraw the proof of claim, and instead seek payment from the solvent corporate group members. This action was filed on June 9, 1989 by the Fund. A month later, on July 19, 1989, the bankruptcy court granted the Fund's motion to withdraw its proof of claim.

Upon confirmation of Mason & Dixon's plan of reorganization under the bankruptcy proceedings, the company's old stock, previously owned by Central Transport, was canceled and reissued to Centra in exchange for a capital contribution of $1,000,000.

II.

A.

The statutory basis of this appeal is the Multiemployer Pension Plan Amendments (1062) Act ("MPPAA"), 29 U.S.C. § 1381 *et seq.* Prior to the passage of the MPPAA, Congress faced the problem of employers withdrawing from financially weak pension plans; such withdrawals had a tendency to reduce the contribution base, adding to the contribution rate of employers presently participating in the plan, while also increasing the incentive for future withdrawals. *Pension Benefit Guar. Corp. v. R.A. Gray*, 467 U.S. 717, 722 n. 2, 104 S.Ct. 2709, 2714 n. 2, 81 L.Ed.2d 601 (1984) (citing *Pension Plan Termination Insurance*

Issues: Hearings Before the Subcommittee on Oversight of the House Committee on Ways and Means, 95th Cong., 2d Sess. 22 (1978) (statement of Matthew M. Lind)). With passage of the MPPAA, a withdrawing employer was required to pay its proportionate share of the plan's unfunded vested benefits, calculated as the difference between the present value of the vested benefits and the current value of the plan's assets. 29 U.S.C. §§ 1381, 1391. The consequent liability of a withdrawal "safeguards the [remaining] participants in multiemployer plans by requiring a withdrawing employer to fund its fair share of the plan obligations incurred during its association with the plan." *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225, 106 S.Ct. 1018, 1026, 89 L.Ed.2d 166 (1986).

B.

The corporate group argues that there is an issue of material fact as to their membership in the statutorily[2] defined control group. The group rests this contention on a rather thin affidavit. The affidavit states only that Central Transport, Inc. owned no stock of Mason & Dixon on or after March 30, 1986. The stock, however, was simply canceled and reissued to Centra pursuant to the restructuring terms of the reorganization of Mason & Dixon. The district court found that "the defendants [were] under common control with Mason & Dixon." This finding is not incorrect.

C.

[1] As a prologue to our discussion of the remaining issues, we address the sufficiency of notice to the group. The corporate group contends that it was never given notice of the assessment of withdrawal liability, alleging essentially that the notice to Mason & Dixon was inadequate. This contention falls rather quickly as

---

[2]See generally 26 U.S.C.A. (I.R.C.) § 1563(a).

notice to one member of the control group constitutes notice to all members of the group. *See e.g. I.A.M. National Pension Fund v. Slyman Industries*, 901 F.2d 127, 129 (D.C.Cir.1990); *Trustees of the Chicago Truck Drivers, Helpers and Warehouse Union (Independent) Pension Fund v. Central Transport, Inc.*, 888 F.2d 1161, 1163 (7th Cir.1989); *Board of Trustees of the Western Conference of Teamsters Pension Fund v. H.F. Johnson, Inc.*, 830 F.2d 1009, 1013 (9th Cir.1987); and *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 127 (3d Cir.1986).

The notice provided to Mason & Dixon adhered to the specifications of the statute that "[a]s soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall—(A) notify the employer of—(i) the amount of the liability, and (ii) the schedule for liability payments, and (B) demand payment in accordance with the schedule." 29 U.S.C. § 1399(b)(1). The language of the statute does not support the inference that the Fund had a responsibility to notify the other members of the control group, other than Mason & Dixon. The burden of subsequent notification to the other control group members lies on the corporation receiving the initial notice. *See Trustees of the Chicago Truck Drivers, Helpers and Warehouse Union (Independent) Pension Fund v. Central Transport, Inc.*, 888 F.2d 1161, 1163 n. 3; and *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 128.

D.

In rejecting the defenses of the corporate group the district court did so on two (1063) grounds. First, the group did not seek arbitration within the statutory period; as arbitration is a jurisdictional prerequisite, the defenses raised were jurisdictionally barred. Second, if arbitration is not a prerequisite, the defenses do not come within one of the exceptions to the doctrine of exhaustion of administrative remedies. We affirm the trial court's decision on this issue based on its second ground only.

[2] While conceding that circuit courts have construed the § 1401 provision in question "as a prudential rather than a jurisdictional prerequisite" to which the doctrine of administrative remedies exhaustion applies,[3] the district court held arbitration to be a jurisdictional bar.

The district court based its conclusion on the language of the statute and the ostensible inapplicability of the exhaustion of administrative remedies doctrine to the MPPAA.

The statute states that any dispute between an employer and the plan sponsor of a multiemployer plan regarding a determination made under §§ 4201-4219 shall be arbitrated. 29 U.S.C. 1401(a)(1). The fact that arbitration is mandatory, does not, in and of itself, transform the requirement into a jurisdictional prerequisite. As the D.C. Circuit stated in *I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton TRI Indus.*,

> Only when Congress states in clear unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision, as in the Social Security Act issue in *Salfi*, has the Supreme Court held that exhaustion is a jurisdictional prerequisite.

727 F.2d 1204, 1207. The mandatory language of § 1401 pales beside the text of the Social Security Act held to bar jurisdiction in *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975). The Social Security Act provided:

---

[3] *See, e.g., I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton TRI Indus.*, 727 F.2d 1204, 1207-09 (D.C.Cir.1984); *T.I.M.E.-D.C., Inc. v. Management-Labor Welfare & Pension Funds*, 756 F.2d 939, 944-45 (2d Cir.1985); *Central States, Southeast and Southwest Pension Fund v. 888 Corp.*, 813 F.2d 760, 764 (6th Cir.1987); *Robbins v. Admiral Merchants Motor Freight, Inc.*, 846 F.2d 1054, 1056 (7th Cir.1988); *Crown Cork & Seal Co. v. Central States, Southeast and Southwest Areas Pension Fund*, 881 F.2d 11, 19 (3d Cir. 1989).

> The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decisions of the Secretary shall be reviewed by an person, tribunal, or government agency except as herein provided.

42 U.S.C. § 405(h). The text of the MPPAA indicates only that arbitration is compulsory; there is no language that explicitly creates a jurisdictional bar. Accordingly, we hold that the text of the statute does not make arbitration a jurisdictional prerequisite. Given the textual basis for our holding, we need not discuss the district court's other rationale for construing arbitration as a jurisdictional bar, the inapplicability of the administrative exhaustion doctrine to MPPAA.

[3,4] The contentions put forward by the corporate group do not fall within an exception to the doctrine of administrative exhaustion. Our analysis begins with recognition of the fact that the exhaustion doctrine acts as a prudential rule that provides the courts "with a method to exercise comity toward administrative agencies and to promote efficient use of judicial resources while protecting the rights of parties who have come before the court seeking relief." *Morrison-Knudsen Co., Inc., v. CHG Int'l, Inc.*, 811 F.2d 1209, 1223 (9th Cir.1987), *cert. denied*, 488 U.S. 935, 109 S.Ct. 358, 102 L.Ed.2d 349 (1988). There are several exceptions to the requirement that parties exhaust administrative remedies before seeking refuge in federal courts. These include those instances where (1) the dispute is a matter of statutory construction; (2) the utilization of administrative procedures would cause irreparable injury; and (3) the resort to administrative procedures would be futile. As the last two exceptions are inapplicable here, (1064) our discussion will focus on the statutory construction exception.

[5] The corporate group invokes the statutory construction exception by arguing that the discharge of withdrawal liability for

Mason & Dixon by the bankruptcy court also discharges all members of the control group. The corporate group avers that it should be allowed to raise the bankruptcy discharge as a defense in the collection suit, without having raised it during arbitration proceedings, because the consequence of the discharge is necessarily an issue of statutory construction. Thus, the issue falls within the first exception to the exhaustion of administrative remedies doctrine.

The corporate group's argument rests, rather precariously, on *Central States, Southeast and Southwest Areas Pension Fund v. 888 Corp.* In *888 Corp.* the defendant tried to assert as a defense to a collection action a provision of the Deficit Reduction Act of 1984, which eliminated the application of MPPAA to employers withdrawing prior to the passage of the act. This provision was not enacted until after the defendant's statutory time to start arbitration had elapsed. Moreover, the provision was not enacted until after the collection suit began. The Sixth Circuit allowed the defense. *Id.*, 813 F.2d 760, 766-67.

The facts presented to the Sixth Circuit in *888 Corp.* and those we face in the instant case are not analogous. In the former case the defendant found itself the beneficiary of a statute determining whether MPPAA even applied to a particular withdrawal by the corporation. It is clear here, however, that even if Chapter 11 discharges one or all members of the control group, the statute does not render MPPAA inapplicable. While *888 Corp.* could not have foreseen the passage of a statute eliminating the retroactive application of MPPAA, Chapter 11 has long been in existence.

Moreover, merely asserting that MPPAA and Chapter 11 require interpretation will not necessarily invoke this exception; "it is beyond cavil that the existence of an issue of statutory interpretation, standing alone does not justify bypassing arbitration." *I.A.M. National Pension Fund v. Clinton Engines Corp.*,

825 F.2d 415, 418 (D.C.Cir.1987). The control group should only be allowed to avoid arbitration if "neither party timely presses the [arbitration requirement], and the court finds that deferring a court contest while the parties repair to arbitration 'will neither lead to the application of superior expertise nor promote judicial economy[,]'" *Id.* at 417, *quoting Grand Union Co. v. Food Employers Labor Relations Association,* 808 F.2d 66, 70 (D.C.Cir.1987). The arbitration requirement was raised by the Fund in the court below. Moreover, judicial economy would have been promoted had the corporate group sought arbitration in a timely manner. As will be made clear in our subsequent discussion of equitable tolling, the corporate group had no legitimate reason for avoiding arbitration earlier. This post-litigation request for arbitration has consumed the time of two courts, delayed the group's withdrawal contribution to the Fund, and could affect the stability and the security of the pension plan. Were we to grant this late request for minimal statutory interpretation, the contribution would be further delayed, the group could appeal the arbitration agreement, and consume the time of the courts yet again. Accordingly, we hold that these defenses do not fall within the statutory construction exception of the doctrine of exhaustion of administrative remedies.

E.

[6] As a premise for their argument for arbitration, the corporate group asserts that the time to initiate arbitration was equitably tolled when the Fund filed a proof of claim in the Mason & Dixon bankruptcy proceedings. This contention is without merit. The doctrine of equitable tolling is inapplicable in MPPAA cases. The MPPAA was created "(1) to protect the interests of participants and beneficiaries in financially distressed multiemployer plans, and (2) . . . to ensure benefit security to plan participants." *Barker & Williamson,* 788 F.2d 118, 127, (original ellipses) (1065) (quoting H.R.Rep. No. 869, 96th

Cong., 2d Sess. 71 (1980)), *reprinted in* 1980 U.S.Code Cong. & Admin.News 2918, 2939. As the district court noted, the 90 day period in which an employer has to review and request arbitration was inserted in the statute to protect the plaintiffs. The statute insures that when a dispute arises about withdrawal, it will be expeditiously addressed.

Statutes of limitations, however, are usually "designed to assure fairness to the defendants." *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 428, 85 S.Ct. 1050, 1055, 13 L.Ed.2d 941 (1965). This is so because "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Id.* (citing *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49, 64 S.Ct. 582, 586, 88 L.Ed. 788 (1944)). Tolling, where equity merits, does not undercut the purpose of traditional statutes of limitations.

Under the MPPAA, however, allowing a defendant to toll the period for arbitration during bankruptcy proceedings and a collection suit undercuts the purpose of the statute, the timely adjudication of withdrawal liability disputes to insure the security of multiemployer plans. Thus, we hold that equitable tolling is inapplicable in the MPPAA context.

F.

[7] Next we take up the issue of whether Mason & Dixon's discharge in bankruptcy discharged withdrawal liability of the other members of the corporate group. The defense offered by the corporate group is analogous to that offered in *I.A.M. Nat'l Pension Fund v. Slyman Indus.* In *Slyman*, on equitable grounds, the solvent members of a control group argued that notice to a withdrawing employer, in bankruptcy proceedings, should not serve as constructive notice to all, as the group reasonably believed the demand would be addressed by the bankruptcy court. 901 F.2d 127, 129. The solvent members argued, as the defend-

ants do here, that failure to seek arbitration should have been excused through equitable tolling. *Id.*, at 129-130. The D.C. Circuit stated "[t]he joint and several liability of a commonly controlled group of corporations precludes this argument." *Id.*, at 129. The court noted that the withdrawing employer could not affect the derivative legal liability of a nonbankruptcy affiliate, for the same reason that one tort-feasor would not be protected because another was in bankruptcy proceedings. *Id.* We agree.

As the district court stated, while a control group may be treated as a "single employer" under the MPPAA, it is a defendant with many pockets. Were all members of the group discharged, this court would allow the defendant to mark its front pockets bankrupt, while removing assets to its back pockets. Accordingly, the corporate group is jointly and severally liable.

G.

[8] Finally, the corporate group contends that the district court erred in awarding attorney's fees; alternatively, the amount of the award was unreasonable. The meritless protestations of the group to the contrary, when a fund is successful in a suit to recover delinquent contributions attorneys fees are mandatory not discretionary. *See* 29 U.S.C. 1132(g).

The fund, nevertheless, contends that attorney's fees are not permitted when a delinquent contribution action constitutes an insignificant part of a case, and, instead, the predominant issue is statutory interpretation. *See H.C. Elliott, Inc. v. Carpenters Pension Trust Fund for Northern California*, 663 F.Supp. 1016 (N.D.Cal. 1987), *aff'd*, 859 F.2d 808 (9th Cir.1988), *cert. denied*, 490 U.S. 1036, 109 S.Ct. 1934, 104 L.Ed.2d 406 (1989). As noted earlier the instant case does not fall within the statutory construction exception. It is, therefore, essentially a collection action. Thus, fees are mandatory. See e.g., *Trustees of Amalgamated Insurance Fund v. Sheldon Hall Clothing, Inc.*, 862 F.2d

1020, 1023-24 (3d Cir.1988), *cert. denied*, 490 U.S. 1082, 109 S.Ct. 2104, 104 L.Ed.2d 665 (1989); and *Teamsters Pension Fund v. Allyn Transportation Co.*, 832 F.2d 502, 507 (9th Cir.1987). Moreover, reviewing (1066) the amount of fees awarded we find no abuse of discretion.

III.

For the reasons set forth in the preceding discussion we affirm the decision of the district court.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
January 8, 1992

No. 90-2483
CA-89-1734-S

CLIFTON MCDONALD; HERMANN V. MYERS, SR.;
WILLIAM G. MCINTYRE; DANIEL L. SANDY,
in their capacities as Trustees of
and on behalf of Freight Drivers and
Helpers Local Union No. 557 Pension Fund

Plaintiffs-Appellees

v.

CENTRA, INCORPORATED, a Delaware corporation;
GENERAL HIGHWAY EXPRESS, an Ohio corporation;
CENTRAL TRANSPORT, INC., a Michigan corporation;
GLS LEASCO, INC, a Michigan corporation;
THE MASON & DIXON TANK LINES, a Tennessee corporation;
CENTRAL CARTAGE COMPANY, a Michigan corporation

Defendants-Appellants

No. 90-2514
CA-89-1734-S

CLIFTON MCDONALD; HERMANN V. MYERS, SR.;
WILLIAM G. MCINTYRE; DANIEL L. SANDY,
in their capacities as Trustees of
and on behalf of Freight Drivers and
Helpers Local Union No. 557 Pension Fund

Plaintiffs-Appellees

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

v.

CENTRA, INCORPORATED, a Delaware corporation;
GENERAL HIGHWAY EXPRESS, an Ohio corporation;
CENTRAL TRANSPORT, INC., a Michigan corporation;
GLS LEASCO, INC, a Michigan corporation;
THE MASON & DIXON TANK LINES, a Tennessee corporation;
CENTRAL CARTAGE COMPANY, a Michigan corporation

Defendants-Appellants

On Petition for Rehearing
with Suggestion for Rehearing In Banc

Appellants' filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Chief Judge Ervin, with the concurrence of Judge Phillips and Judge Hamilton.

For the Court,

CLERK